No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JEAN DOE AND JANE DOE, a minor,
Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,
Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

What is the proper standard of liability of a school district under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, *et seq.*, for a teacher's sexual harassment of a pupil?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 14

APPENDIX A 1a

APPENDIX B 11a

APPENDIX C 17a

TABLE OF AUTHORITIES

Cases **Page**

Board of the County Commissioners of Bryan County v. Brown, 1997 WL 201995 (U.S. April 28, 1997) 8

Bruneau v. South Kortright Central School District, 935 F.Supp. 162 (N.D. N.Y. 1996) 10

Burrow v. Postville Comm. Sch. Dist., 929 F.Supp. 1193 (N.D. Ia. 1996) 10

Doe v. Claiborne County Board of Education, 103 F.3d 495 (6th Cir. 1996) 11

Doe v. Lago Vista Independent School District, 106 F.3d 1223 (5th.Cir 1997) 6

Doe v. Petaluma City School District, 830 F. Supp. 1560 (N.D. Cal. 1993), *reconsideration granted*, 949 F.Supp. 1415 (N.D. Cal. 1996) 11

Doe v. Taylor I.S.D., 15 F.3d 443 (5th Cir. 1994) (*en banc*) 7

Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 112 S.Ct. 1028 (1992) . . . *passim*

Hastings v. Hancock, 842 F.Supp. 1315 (D. Kan. 1993) 11

Leija v. Canutillo Independent School District, 101 F.3d 393 (5th Cir. 1996) 6, 10

Meritor Savings Bank, FSB v. Vinson,
477 U.S. 57, 106 S.Ct. 2399 (1986) 9, 10, 12, 13

Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 98 S.Ct. 2018 (1978) 8

Pallet v. Palma,
914 F.Supp. 1018 (S.D. N.Y. 1996) 10

Patricia H. v. Berkeley Unified Sch. Dist.,
830 F.Supp. 1288 (N.D. Cal. 1993) 11

Pinkney v. Robinson,
913 F.Supp. 25 (D. D.C. 1996) 11

Rosa H. v. San Elizario I.S.D.,
106 F.3d 648 (5th Cir. 1996) 6

Saville v. Houston County Healthcare Authority,
852 F.Supp. 1512 (M.D. Ala. 1994) 11

Ward v. Johns Hopkins University,
861 F.Supp. 367 (D. Md. 1994) 11

Statutes and Rules

20 USC §1681, *et seq.* . . . . . i, 5

28 USC §1254(1) 1

20 USC §1681(a) 1, 6

42 USC §1983 . . . . . 5, 8

62 Fed. Reg. 12,034 (1997) 14

Miscellaneous

RESTATEMENT (SECOND) OF AGENCY, §219 . . 12

Petitioners Jane Doe and Jean Doe, a minor, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above proceedings on February 24, 1997.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Western District of Texas is reprinted in Appendix A, *infra*. The opinion of the court of appeals is reported at 106 F.3d 1223 (5th Cir. 1997) and is reprinted in Appendix B, *infra*. The judgment of the court of appeals is reprinted in Appendix C, *infra*.

JURISDICTION

The court of appeals entered its judgment on February 24, 1997. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a), provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance... .

STATEMENT OF THE CASE

Jane Doe was a minor when this action was filed, but has since become an adult. Jean Doe, who sued as next friend, is her mother. Respondent Lago Vista Independent School District is a public school district which, at all times pertinent to this dispute, received federal financial assistance. Collier Deposition, Page 23, Lines 13--20, R. 372. Jane Doe was a pupil in that District.

Jane Doe was thirteen years of age when she first encountered Frank Waldrop, who was the husband of Jane Doe's teacher in middle school. Gebser Deposition, Page 22, Lines 10--25. R. 346. Waldrop, a retired U. S. Marines Colonel, R. 143, was employed as a high school teacher by Respondent.

While in middle school, Jane Doe was in a gifted and talented program taught by Frank Waldrop's wife but her precocity caused Mr. and Mrs. Waldrop to arrange to have her attend a great books discussion group at the high school level, led by Mr. Waldrop. Gebser Deposition, Page 23, Lines 4--23, R. 346. The next year this contact between Jane Doe and Waldrop became a formal student-teacher relationship, and Waldrop began singling her out for special attention, because, she thought, of her intellectual qualities. Gebser Deposition, page 42, Lines 2--19, R. 349.

This attention rapidly became personal, and Waldrop steadily escalated his approaches from merely verbal to overtly physical and sexual by the spring of 1992, during Jane Doe's freshman year. Gebser Deposition, Page 42, Line 2--Page 51, Line 5, R. 350--51. Later in the spring of 1992, Waldrop had sexual intercourse with her. Gebser Deposition, Page 62, Lines 12--19, R. 353. Jane Doe attended summer classes taught by Waldrop, who took

advantage of his access to her by having sexual intercourse with her frequently throughout the summer of 1992. Gebser Deposition, Page 62, Line 20--Page 63, Line 24, R. 353. This continued into the following school year, until January, 1993.

Jane Doe testified that her principal motivation in allowing and continuing the sexual relationship was to continue having Waldrop as her teacher. Gebser Deposition, Page 66, Lines 3--10, R. 353. Waldrop was, before the revelation of this relationship, considered to be a good teacher (Collier Deposition, p. 16, l. 24; p. 17, l. 17), and given the wide range of power a teacher has over a student it is unsurprising that Jane Doe was both flattered and flustered by his attention. Moreover, she testified, she did not know anyone to whom she could report his transgressions. Gebser Deposition, Page 68, Lines 5--15, R. 354.

Virginia Collier was Respondent's superintendent during this period. Collier Deposition, Page 4, Lines 19--22, R. 369. She acted as the coordinator of Title IX and had responsibilities relating to the prevention of gender discrimination. Collier Deposition, Page 22, Line 16--Page 23, Line 12, R. 372. Until the revelation of Waldrop's misconduct, Ms. Collier was only casually acquainted with Jane Doe. Collier Deposition, Page 8, Line 15--Page 10, Line 19, R. 369--70.

Ms. Collier stated that no specific person was appointed by the district to receive complaints of inappropriate sexual conduct or harassment, and that instead the principals of each school would have been the persons to receive such complaints. Collier Deposition, Page 28, Line 18--Page 29, Line 13, R. 373. She was unaware of any specific information delivered to students informing them of

this fact, however. Collier Deposition, Page 29, Line 4--Page 30, Line 18, R. 373. Similarly, she could not recall any district-wide meetings or counselling services to the faculty for the purpose of dealing with teacher-student sexuality except for an address by the district's lawyer which occurred after Waldrop's relationship with Jane Doe had been discovered. Collier Deposition, Page 26, Line 5--Page 27, Line 20, R. 373.

Mrs. Collier testified that all teachers are allowed a wide latitude in their contacts with students, including time in which a teacher would be alone with a student, and that teachers were allowed the use of school facilities to meet with students after regular school hours and during the summer months. Any district supervision of the teachers would, she said, be "sporadic." Collier Deposition, Page 52, Line 11--Page 53, Line 7, R. 377. While this is probably an inescapable fact of life in public school districts, it is one fraught with dangers. A teacher has unrestricted power over the student: He can give or withhold favorable attention in the classroom; he can grant high or low grades on the basis of a subjective evaluation; his grades, letters of recommendation and other assistance, play a large part in the students' eligibility for college admission and financial assistance.

While there is no direct evidence that any school official was aware of Waldrop's sexual exploitation of Jane Doe, the parents and guardian of two other students did complain to district officials of inappropriately suggestive remarks Waldrop made to and in the presence of their daughter and their female ward. Tully Deposition, Page 18, Line 5--Page 19, Line 19, R. 496. This complaint was made by Anna Tully to Michael Riggs, the principal of the high school. He accepted Waldrop's denial of the incidents and of any bad intention (Riggs Deposition, Page 28, Line 11--

Page 29, Line 13, R. 393), without reporting the complaint to the superintendent Collier. She agreed that the incident should have been reported to her. Collier Deposition, Page 79, Line 11--Page 80, Line 5, R. 382.

The procedural background of this Petition is as follows. Originally Jane and Jean Doe filed their action in state court, naming Respondent and Frank Waldrop as defendants. Against Waldrop they alleged causes of action based on negligent and intentional torts. Against the school district they alleged violations of Jane Doe's rights under 42 U.S.C. §1983 and under Title IX, Educational Amendments of 1972, 20 U.S.C. §1681, *et seq.* Subsequently, on Respondent's motion, the case was removed to federal district court.

After extensive discovery and shortly before this suit was to be called for trial, the United States District Court for the Western District of Texas denied the plaintiff's Motion for a Partial Summary Judgment and granted the school district's Motion for Summary Judgment. The memorandum opinion of the district court is set out at Appendix A. Plaintiffs then non-suited their claim against Frank Waldrop, and the district court then entered its final judgment, which was appealed to the Court of Appeals for the Fifth Circuit. A three-judge panel unanimously affirmed the lower court's judgment, and issued an opinion which is set out at Appendix B.

REASONS FOR GRANTING THE WRIT

The right of students to be free of sexual discrimination, harassment and exploitation by teachers and other employees and officials of public school districts is, as a result of the plethora of opinions from federal district courts and courts of appeals, uncertain. The standards under

which a school district should be held liable for the intentional discriminatory conduct of its agents and employees are unclear. An opinion by this Court, squarely addressing that issue, will clarify the rights of victims of sexual abuse and will serve to enlighten public school officials regarding their duty to supervise their agents and employees, and by so doing will help to reduce the incidence of such abuse.

I.

This Court held, in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028 (1992), that a private cause of action exists under the broad mandate of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a), prohibiting sexual discrimination by educational institutions receiving Federal financial assistance. Three decisions recently announced by the Court of Appeals for the Fifth Circuit, for all practical intents and purposes, nullify the right recognized in *Franklin* and essentially immunize public school districts from liability for the misdeeds of its teachers.

In *Leija v. Canutillo Independent School District*, 101 F.3d 393 (5th Cir. 1996), the Fifth Circuit rejected the district court's holding that a school district should be held strictly liable for a teacher's sexual abuse of his student. By implication that opinion even rejected the notion that the district should be liable on the basis of actual knowledge of the abuse, when the knowledge is possessed only by another classroom teacher, on the ground that the teacher "did not have the requisite authority" to justify imputing her knowledge to the district. In *Rosa H. v. San Elizario I.S.D*, 106 F.3d 648 (5th Cir. 1996), the Fifth Circuit rejected the argument that a district could be held liable on the basis of its constructive knowledge of the wrongdoing. And in the

opinion made the basis of this Petition, *Doe v. Lago Vista Independent School District*, *supra*, the Fifth Circuit rejected the contention that a school district could be held liable for its teachers' misdeeds on the basis of common law agency principles.

Thus, in the Fifth Circuit, a student's cause of action under Title IX, as declared in *Franklin*, is limited to those situations in which the sexual perpetrator is an elected official of the school district, or a managerial or executive official such as a superintendent or, perhaps, a principal, and to those situations in which a comparable individual actually knows that the sexual abuse is occurring and then consciously fails to take any action to stop it. While such egregious conduct must occasionally occur, *see, e.g., Doe v. Taylor I.S.D.*, 15 F.3d 443 (5th Cir. 1994) (*en banc*), the vast majority of instances of sexual abuse is subtler and more covert. If this circumscription of the right of action recognized in *Franklin* is what this Court intended, then this Court should clarify its intention.

A careful reading of *Franklin*, and a consideration of its procedural underpinnings, suggests that the Fifth Circuit has wholly ignored this Court's clear intention to create a private cause of action for legal damages by wronged students against the public school districts when the districts' employees use their inherent authority over the students and engage in sexual abuse and exploitation. First, by recognizing a right of action arising under Title IX, the Court necessarily contemplated that the action would be against the *school district*s, not against the individual wrongdoers. It is the districts, after all, which are "receiving Federal financial assistance," and it is the receipt of that assistance that triggers the liability. Second, sexual abuse and exploitation are by their nature intentional actions perpetrated by individuals, not institutions. If a district

receiving Federal financial assistance is liable for such abuse and exploitation, there must be some form of imputation of liability.

The precise extent and basis of that imputation of liability is not directly addressed by the *Franklin* opinion, but its nature is revealed somewhat by a consideration of the procedural background of the case. Franklin, a minor female, sued the school district and a teacher, alleging that the teacher had persuaded her to engage in a sexual relationship; she based her claim against the school district on 42 U.S.C.§1983, and on Title IX. The district court granted the school district's motion for summary judgment as to both theories, and the court of appeals affirmed. This Court affirmed the court of appeals with respect to the action based on 42 U.S.C. §1983, but reversed with respect to Title IX.

While there is scant discussion in the Court's opinion regarding the 42 U.S.C. §1983 claim asserted by Franklin, it seems clear that the basis of the Court's ruling was the *Monell* doctrine. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018 (1978). As elaborated by this Court's quite recent decision in *Board of the County Commissioners of Bryan County v. Brown*, 1997 WL 201995 (U.S. April 28, 1997), that doctrine rejects the imposition of liability on municipalities based simply on the respondeat superior doctrine, or on any variant of the law of agency, in the absence of evidence of a municipal policy or custom that caused the violation of the civil right.[1]

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[1] This doctrine is based on the precise statutory language of 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This Court's rejection of Franklin's §1983 claim, while recognizing the validity of her claim based on Title IX, powerfully suggests that the Court has considered the question of the standard of a school district's liability for its employees' and agents' wrongdoing, and that it has determined that the Title IX standard is different from and lower than the §1983 standard.

The opinion in *Franklin*, however, is no more than suggestive regarding the principles by which liability for a teacher's intentional wrongdoing is imputed to the school district in implementing the student's cause of action under Title IX. That suggestion appears in the following passage, in which the Court rejects the school district's argument that it should not be held liable for its own unintentional violations of Title IX when the only basis of liability was a teacher's intentional but unknown acts, because the district would have no notice that it may be potentially liable for such violations. The Court held:

> This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on [the district] the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed. 2d 49

(1986). We believe the same rule should apply when a teacher sexually

> harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.
>
> 112 S.Ct. 1028, at 1037 (1992)

The facts supporting Jane Doe's Title IX claim are virtually identical to the facts recited in *Franklin*. While it is true that the plaintiff in *Franklin* alleged actual knowledge of the teacher's transgressions, the Court nowhere refers to this allegation as a crucial element in its holding. Indeed, in the passage quoted above, the Court emphasizes that from the district's standpoint the discriminatory conduct was both unintentional and unknown. It is this aspect of the Supreme Court's opinion in *Franklin* that the Fifth Circuit has ignored; instead of following this holding, the Fifth Circuit has created an ill-defined standard that would require actual knowledge at some unspecified but high level of the school district's political hierarchy, perhaps limited to actual elected officials; *see Leija v. Canutillo I.S.D.*, *supra*. It is almost inconceivable that any plaintiff will be able to meet that burden, with the result that the right recognized in *Franklin* is one in name only.

By invoking *Meritor*, the Court clearly indicated that cases arising under Title IX should be resolved using the principles applicable to 28 U.S.C. Title VII. Courts elsewhere, in obedience to the Supreme Court's indication in *Franklin* of the proper standard of school district liability, have utilized principles derived from Title VII cases, and those cases demonstrate that those principles are both workable and fair to all the parties. *See, e.g., Bruneau v. South Kortright Central School District*, 935 F. Supp. 162

(N.D. N.Y. 1996); *Burrow v. Postville Comm. Sch. Dist.*, 929 F.Supp. 1193 (N.D. Ia. 1996); *Pallet v. Palma*, 914 F. Supp. 1018 (S.D. N.Y. 1996); *Pinkney v. Robinson*, 913 F. Supp. 25 (D. D.C. 1996); *Ward v. Johns Hopkins University*, 861 F. Supp. 367 (D. Md. 1994); *Saville v. Houston County Healthcare Authority*, 852 F. Supp. 1512 (M.D. Ala. 1994); *Hastings v. Hancock*, 842 F. Supp. 1315 (D. Kan. 1993); *Doe v. Petaluma City School District*, 830 F. Supp. 1560 (N.D. Cal. 1993), *reconsideration granted*, 949 F. Supp. 1415 (N.D. Cal.) 1996); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288 (N.D. Cal. 1993). The Sixth Circuit has categorically declared that Title IX cases are most appropriately decided according to the standards that have evolved in consideration of Title VII, holding:

> Both Title IX's legislative history and the regulations enacted pursuant to it amply support this approach. The House Report on Title IX states that 'Title VII ... specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.
>
> *Doe v. Claiborne County Board of Education*, 103 F.3d 495, 514 (6th Cir. 1996)

While *Doe v. Claiborne* is an employment discrimination case, there is no substantive basis for concluding that the standard of liability arising under Title IX should be different for sexual abuse cases arising under Title IX.

Hastings v. Hancock, 824 F.Supp. 1315 (D. Kan. 1993), is an instance in which this Court's directive in *Franklin* was followed. In that case, the plaintiff was a

student at a school of cosmetology operated by Hancock pursuant to a license issued to the Morrisons. The plaintiff sought successfully to hold Morrison liable because Hancock had, in violation of Title IX, created a hostile environment. The court noted *Franklin*'s reliance on *Meritor* and on the RESTATEMENT (SECOND) OF AGENCY, and specifically relied on §219 of that work:

> (2) A master is not liable for the torts of his servants acting outside the scope of their employment unless:
> ***
> (d) the servant purported to speak or act on behalf of the principal and there was reliance upon the apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relationship*.
>
> RESTATEMENT (SECOND) OF AGENCY, §219
> (*emphasis added*)

The testimony presented as summary judgment evidence fully establishes that Waldrop had complete authority over Jane Doe, and that this power was invested in him by the district. To her, he personified the school district, and she was unaware of the school district's loose and ineffective effort to supply her with avenues for complaints about improper conduct. Waldrop had the power to withhold or grant his favors as a teacher, the power to withhold or grant good grades and to govern every aspect of his students' conduct. He was privileged to meet with students privately in the school facilities and during the summer months. All these powers aided him in accomplishing his purpose.

II.

Not only did the Fifth Circuit ignore this Court's holding in *Franklin*, it has also ignored the regulatory system implementing Title IX. While such regulations are not controlling on the courts by reason of their authority, as this Court has observed, they do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Meritor Savings Bank, FSB v. Vinson*, *supra*. Implementation of Title IX is the responsibility of the Department of Education's Office for Civil Rights ("OCR"). As early as 1975, the OCR promulgated regulations requiring school districts to disseminate to their students a policy against sexual discrimination and to establish a detailed notification and complaint-resolution procedure. As the testimony of Superintendent Collier reveals in this case, the Respondent at best paid only lip service to these requirements, so that there was no effective way for Jane Doe to seek aid when her teacher initiated his seduction of her, much less afterwards when his efforts resulted in a sexual relationship.

Adult sexual predation on minors is almost always covert, involving escalating pressures calculated to create a feeling of complicity on the part of the minor. Such was the case with Waldrop's seduction of Jane Doe. An adequate statement of policy against sexual contact and discrimination between faculty and students helps the student to recognize inappropriate behavior by a teacher; an adequate structure for notification and complaint affords the student an avenue for help and legitimizes the student when her complaint is just. Such aid was unavailable to Jane Doe, in violation of applicable regulations. Yet the Fifth Circuit's holdings, in this and the other Title IX cases it recently announced, in effect bar her claim because the district was ignorant of its teacher's misconduct. This is not only harsh and unjust

toward Jane Doe, the innocent victim of sexual predation. Worse, it encourages school districts to continue to pay mere lip service to the regulations and to turn a blind eye toward complaints, just as the Respondent did to the Tully complaints described above.

The OCR's most recent body of regulations implementing Title IX specifically impose on school districts a standard of liability based on Title VII, thus amplifying the argument urged in the previous section. "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties," 62 Fed. Reg. 12,034 (1997), states:

> [I]n the absence of effective policies and grievance procedures, if the alleged harassment was sufficiently severe, persistent, or pervasive to create a hostile environment, a school will be in violation of Title IX because of the existence of a hostile environment, even if the school was not aware of the harassment and thus failed to remedy it.

CONCLUSION

It hardly needs to be said that sexual abuse or exploitation of a minor by an adult is a wrong that should, if possible, be redressed by the courts. This Court in *Franklin* went a great distance in doing just that in the public school context. While the award of civil damages to the victims of such abuse and exploitation will only partly redress that wrong, it would serve the same purpose as awards of damages in any other case involving personal injury. Money damages may not cure the psychological harm which foreseeably results from abuse and exploitation, but they will at least enable the victim to seek such remedies as are

available, and they will at least legitimize the victim and erase the stigma that her falsely inculcated feelings of complicity entail. Of equal importance, the threat of money damages will encourage those with the power to minimize such wrongs to do so. The Fifth Circuit placed undue emphasis on its perception of the injustice of holding an innocent and unknowing school district liable for the intentional misdeeds of its employees. Its decisions, virtually immunizing school districts from liability, will only enable wrongdoers to persist in their actions. If this Court's opinion and the regulations of the Department of Education were implemented, rather than ignored, sexual abuse would surely not disappear. But the instances of it would undoubtedly be fewer. That is a goal worthy of attaining, and to achieve that goal Petitioners respectfully pray that this Court grant their Petition, reverse the court below, announce clear standards of liability for the school district, and remand this case for trial on the merits.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JEAN DOE, AS GUARDIAN	§	
AND NEXT FRIEND OF JANE DOE	§	
	§	
VS.	§	**NO. A 95**
	§	**CA 126 SS**
FRANK NEWTON WALDROP and	§	
LAGO VISTA INDEPENDENT	§	
SCHOOL DISTRICT	§	

ORDER

Before the Court are Plaintiff's Motion for Partial Summary Judgment and Defendant Lago Vista Independent School District's Motion for Summary Judgment. Plaintiff has asserted causes of action for negligence, violation of her civil rights[1], and violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* against the Lago Vista Independent School District (LVISD). Plaintiff seeks summary judgment as to the Title IX cause of action.

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[1] Although the Court finds no reference in the amended complaint to a section 1983 claim against Lago Vista Independent School District, the parties address the cause of action in their motions.

LVISD seeks summary judgment on all causes of action asserted against it.

This case arises out of out of improper sexual contact between Jane Doe and Frank Newton Waldrop. At the time of the alleged sexual abuse, Waldrop was a high school teacher in the LVISD and Doe was a student at Lago Vista High School. The school district has not presented an evidentiary challenge to whether the sexual contact/abuse occurred.

Negligence

Plaintiff asserts a negligence cause of action against LVISD for failure to properly supervise Waldrop. Under Texas law, however, a school district may be liable in tort only for activities arising out of the use of a motor vehicle. TEX. CIV. PRAC. & REM. CODE § 101.051; *see also*, *Barr v. Bernhard*, 562 S.W.2d 844, 846 (Tex. 1978). The negligence cause of action asserted by Plaintiff does not arise out of the use of a motor vehicle. Plaintiff has conceded that she cannot maintain her negligence cause of action against LVISD.

42 U.S.C. § 1983

Plaintiff contends that LVISD violated her substantive due process rights by demonstrating deliberate indifference toward her constitutional rights. In order to establish a cause of action on this claim, Plaintiff must demonstrate:

> (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student;
>
> (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
>
> (3) such failure caused a constitutional injury to the student.

Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 454 (5th Cir.), *cert. denied*, 115 S.Ct. 70 (1994).

Plaintiff maintains that summary judgment on her section 1983 claim is not proper because Michael Riggs, principal of Lago Vista High School, failed to take appropriate action in response to a complaint made by Anna Tully, a parent of two students at the high school. In October 1992, Ms. Tully complained to Riggs about inappropriate and offensive *statements* made by Waldrop to the students. The undisputed evidence is that Riggs had a meeting with both the Mr. and Mrs. Tully and Waldrop to address the complaints about the statements. Ms. Tully did not inform Riggs of any further concerns about Waldrop's conduct prior to the arrest of Waldrop in January 1993. Plaintiff asserts that LVISD's failure to take further action in conjunction with the complaint establishes deliberate indifference.

The summary judgment evidence before the Court does not establish a genuine issue of material fact as to either of the first two elements of the section 1983 cause of action. The allegations that statements made by Riggs were sexually

oriented and offensive to students does not "point[] plainly toward the conclusion" that Waldrop was sexually abusing a student or would do so in the future. Construing Tully's allegations in the light most favorable to Plaintiff, the Court finds no evidence in this record that would plainly direct Riggs to the conclusion that Waldrop's behavior was anything more than inappropriate comments in a classroom situation.

Additionally, the Court finds as a matter of law that the actions taken by the Riggs in response to the complaint obviate any finding of deliberate indifference.[2] Riggs held a conference at which the complaints were discussed with Waldrop. After the conference he directed Waldrop to be more careful and sensitive about his remarks to the students. Finally, and importantly, he received no indication that Waldrop did not heed the warning about his behavior. In short, Riggs took action on Mrs. Tully's complaints that, at the time, appeared to have been effective. There is no evidence to suggest that Riggs' response to the complaint was not a good faith effort to solve the problem.

Finally, even assuming the actions of Riggs were deliberately indifferent, *Taylor I.S.D.* does not extend the liability of a governmental unit to include responsibility for constitutional violations by school principals. The decision merely sets forth under what conditions a supervisory school official may be held *individually* liable for a subordinate's violations of a student's constitutional rights. *Id.* at 453-454. Plaintiff may not rely on her allegations of

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[2] The opinion of the expert retained by Plaintiff is not relevant to whether or not Riggs displayed deliberate indifference. Even if Riggs' response was ineffective, the question of deliberate indifference turns on the good faith of his response. *Id.* at 456 n.12.

deliberate indifference by Principal Riggs to establish an official policy or custom of LVISD. *See Gonzalez v. Yselta Indep. Sch. Dist.*, 996 F.2d 745, 752 (5th Cir. 1993) ("Texas law provides that the Board of Trustees is responsible for determining school policy.")

For these multiple reasons, Plaintiff's section 1983 cause of action against LVISD cannot survive summary judgment.

Title IX

Both Doe and LVISD move for summary judgment on Plaintiff's Title IX cause of action. Both parties recognize that a private cause of action exists under Title IX for discrimination when a teacher has improper sexual contact with a student. *See Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028, 1032 (1992). The pivotal issue of disagreement is the standard for imposing liability on a school district for the intentional acts of one of its teachers. Plaintiff contends school districts are held strictly liable for the discrimination by their teachers in violation of Title IX. LVISD argues that a school district must have some knowledge or reason to know of the discrimination before liability may be imposed for a Title IX violation.

Unfortunately, the Supreme Court did not address this issue in *Franklin*.[3] Within the Fifth Circuit, the standard for liability in sexual abuse cases has been addressed by two courts in this district, but with divergent results. In *Leija*,

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[3] In *Franklin*, Plaintiff had alleged teachers and administrators knew of the sexual harassment of Franklin, but failed to take action to stop the harassment. *Id.* at 1031.

Judge Ferguson held that school districts are strictly liable for limited damages for the discrimination by a teacher in cases involving sexual abuse of students by the teacher. *Leija v. Canutillo Indep. Sch. Dist.*, 887 F.Supp. 947, 953-55 (W.D. Tex. June 9, 1995),*interlocutory appeal docketed*, No. 95-00195 (5th Cir. Oct. 30, 1995). Addressing similar facts, Judge Briones held that a plaintiff must show that the school district had actual or constructive notice of the sexual abuse or discrimination, the school district failed to take "prompt, effective, remedial measures," and the school district's conduct was negligent. *Rosa H. v. San Elizario Indep. Sch. Dist.*, 887 F.Supp. 140, 143 (W.D.Tex June 12, 1995).

Title IX prohibits intentional discrimination on the basis of gender in connection with educational programs receiving federal funds. *See Chance v. Rice Univ.*, 984 F.2d 151, 153 (5th Cir. 1993). By enacting Title IX, Congress sought (1) "to avoid the use of federal resources to support discriminatory practices" and (2) "to provide the individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 99 S.Ct. 1946, 1961 (1979). Title IX was enacted to counter *policies* of discrimination, whether formal or informal, in federally funded education programs. *Id.* at 1961 n.36 (quoting Representative Mink on the purpose of Title IX.). The purpose of Title IX is not furthered by the imposition of strict liability on school districts when a teacher sexually abuses a student unbeknownst to those in a position to stop the abuse.[4]

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[4] Unlike the Court in *Leija*, this Court does not find support in either the statute or the Supreme Court's decision in *Franklin* for imposing strict liability on school districts for sexual abuse committed by a teacher. *Leija*, 887 F.Supp. at 953-55.

Having rejected the strict liability standard[5] this Court believes that in order to prevail on a Title IX cause of action for personal injuries and damages, a plaintiff must show the school district had actual or constructive notice of the nature or type of the discrimination alleged by a plaintiff or notice of circumstances which indicate a strong potential for the type of discrimination alleged by the plaintiff.[6] Only once notice is established may the response of the school district to the discrimination be evaluated as far as liability in monetary damages is concerned. A school district, of course, must act is good faith on notice of sexual discrimination, resolve the problem, and prevent further discrimination in violation of Title IX.

Only if school administrators have some type of notice of the gender discrimination and fail to respond in good faith can the discrimination be interpreted as a *policy* of the school district.[7] To hold a governmental unit liable based on the individual action of a teacher (obviously such conduct would be outside the scope of employment) would be to hold the school district strictly liable for the criminal

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[5] Other courts addressing imputation of liability under Title IX have also rejected the strict liability approach. *See, e.g., Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-50 (2d Cir. 1995); *Floyd v. Waiters*, 831 F.Supp. 867 (M.D. Ga. 1993); *Howard v. Bd. of Educ. of Sycamore Community Unit Sch.Dist. No. 427*, 876 F.Supp. 959, 974 (N.D. Ill. 1995); *Slaughter v. Waubonsee Community College*, 1995 WL 579296 (N.D. Ill. Sept. 29, 1995).

[6] Examples of notice of circumstances suggesting potential discrimination might include persistent rumors about a teacher's sexual involvement with a student or a teacher's resignation from previous employment under suspicion of sexual misconduct.

[7] This standard is less rigorous than that applied to establishing policies in the section 1983 context. *See, e.g., Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 753-55 (5th Cir. 1993).

conduct of one of its teachers. By attempting to prohibit intentional discrimination on the basis of gender, Congress sought to alter the policies of schools receiving federal funds. Congress did not expressly impose civil liability upon school districts for unanticipated actions taken by teachers outside the scope of their employment responsibilities and neither will this Court.

The Court finds further support for this standard in *Franklin's* reference to *Meritor Savings Bank FSB v. Vinson*, 106 S.Ct. 2399 (1986), a Title VII case.[8] In *Vinson*, the Supreme Court held that an employer is not automatically liable for sexual harassment by a supervisor, but the Court declined to provide a precise standard for liability. *Vinson*, 106 S.Ct. at 2408. Addressing the issue of employer liability under Title VII, the Fifth Circuit has determined:

> While *Harris [v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993)] proclaims that sexually hostile or abusive work environments are no longer tolerated under Title VII, that fact does not transform Title VII into a strict liability statute for employers. An employer is liable only if it knew or should have known of the employee's offensive conduct and did not take steps to repudiate that conduct and eliminate the hostile environment."

Nash v. Electrospace System, Inc., 9 F.3d 401, 404 (5th Cir. 1993) (citing *Jones v. Flagship International*, 793 F.2d 714, 720 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 952 (1987)). The Court believes similar reasoning applies to school district liability under Title IX. The prohibition of

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[8] The Supreme Court cited the *Vinson* for the holding that sexual abuse of a student constitutes discrimination on the basis of gender. *See Franklin*, 112 S.Ct. at 1037.

discrimination on the basis of gender does not reach so far as to impose strict liability on school districts for actions taken by teachers. Under Title IX, a school district must have actual or constructive notice of the discrimination before it may be held liable for the actions of the teacher.

In the case at bar, the only complaint received by LVISD about Waldrop was the Tully complaint about offensive remarks made during class. Principal Riggs promptly addressed this issue with Waldrop. The Court finds as a matter of law, the Tully complaint was not sufficient to establish a genuine issue of material fact as to LVISD's actual or constructive notice of Waldrop's sexually discriminatory conduct alleged by Plaintiff in this case. There is no other evidence in the record to place LVISD on notice that Waldrop had or would sexually abuse female students in the manner alleged by Plaintiff. LVISD had no knowledge of the abuse action alleged prior to Waldrop's arrest in January 1993. Consequently, LVISD may not be held liable for Waldrop's actions in violation of Title IX.

Conclusion

Plaintiff concedes she cannot maintain her negligence cause of action against LVISD. The Court has determined as a matter of law that LVISD did not exhibit deliberate indifference to Jane Doe's constitutional rights and that the school district was without the notice of the discrimination required to pursue a claim against it under Title IX. Therefore, summary judgment is appropriate as to all causes of action asserted by Plaintiff against the Lago Vista Independent School District. The causes of action asserted against Defendant Frank Waldrop are not affected by this disposition.

Accordingly, the Court enters the following orders:

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment, filed November 3, 1995, is DENIED; and

IT IS ORDERED that Defendant Lago Vista Independent School District's Motion for Summary Judgment [#37] is GRANTED as to all causes of action asserted against Lago Vista Independent School District by Plaintiff.

SIGNED on this 28th day of November 1995.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX B

U.S. COURT OF APPEALS
F I L E D
FEB 24 1997
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50056

JEAN DOE, as Guardian and Next Friend of Jane Doe; JANE DOE,
Plaintiffs-Appellants,

versus

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before KING and HIGGINBOTHAM, Circuit Judges, and LAKE,* District Judge.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

* District Judge of the Southern District of Texas, sitting by designation.

This case presents the question of when a school district is liable under Title IX for a teacher's sexual harassment of a student. We recently addressed this question in a pair of Title IX cases, *Rosa H. v. San Elizario Indep. School Dist.*, __ F.3d __, No. 95-50811 (5th Cir. 1997), and *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996). Based on those cases, we affirm summary judgment in favor of the school district.

I.

Frank Waldrop, a teacher at Lago Vista High School, first met Jane Doe while she was a student in his wife's eighth-grade honors class during the 1990-91 school year. At that time, she was thirteen. Because Doe needed a more challenging academic program, Waldrop's wife referred her to her husband's high school discussion group, which Doe participated in for several weeks. When Doe became a ninth-grader, she was assigned to Waldrop's class in advanced social studies. Their relationship grew during the academic year. Waldrop went out of his way to flatter Doe and spend time alone with her, and Doe enjoyed receiving attention from her instructor.

Waldrop initiated sexual contact with her at her home in the spring of 1992. Knowing she would be alone, he visited under the pretext of returning a book and proceeded to fondle her breasts and unzip her pants. During the summer, Waldrop had sex on a regular basis with Doe, who was by then fifteen years old. None of the encounters took place on school property. The relationship ended in January of 1993, when a Lago Vista police officer happened to discover Waldrop and Doe having sex.

Doe agrees with the school district that "there was no direct evidence that any school official was aware of

Waldrop's sexual exploitation of Jane Doe" until January of 1993. The parents and guardian of two other students complained to Michael Riggs, the high school principal, that Waldrop had made inappropriate remarks in the presence of female students. Riggs organized an investigation into this complaint, Waldrop denied the charges, and Riggs did not bring the matter to the attention of Virginia Collier, the district superintendent.

The plaintiff sued the school district for negligence and for violations of § 1983 and Title IX. The plaintiff concedes that her negligence action cannot succeed under Texas law. Judge Sparks granted summary judgment to the school district on both statutory claims. Doe appeals only the summary judgment on her Title IX claim.

II.

Doe's Title IX cause of action has its origin in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). But while *Franklin* made it possible for private litigants to use Title IX to recover money damages when teachers sexually abuse students, it did not set out the standard for assessing a school district's liability. The school district insists that Doe cannot recover unless we are willing to hold educational institutions strictly liable for teacher's misconduct. Doe, on the other hand, claims that summary judgment was inappropriate because school districts can be liable on agency principles when a teacher uses his position of authority to abuse students sexually.

We have recently rejected the notion that Title IX creates strict liability in teacher-student sexual harassment cases. In *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), we reversed a district court's denial of summary judgment where a teacher molested a second-grade

student during movies on school grounds and another teacher had notice of the harassment. A school district is not absolutely liable because, "[s]imply put, strict liability is not part of the Title IX contract." 101 F.3d at 399. To recover, Doe must be able to articulate a theory that is less expansive than strict liability.

One possibility is a theory based on constructive notice. Under this theory, Title IX plaintiffs, like Title VII plaintiffs, can prevail by showing that management-level authorities should have known of the misconduct and failed to take steps to end it. *See Waltman v. Int'l Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989). In *Leija*, we held that the teacher's abusive conduct was not so pervasive that a reasonable juror could find constructive notice, in spite of the fact that a student and her mother reported the abuse to a teacher. *Leija*, 101 F.3d at 402. Doe does not pursue the constructive-notice theory because, as in *Leija*, there is not enough evidence for a jury to conclude that a Lago Vista school official should have known about the abuse. Doe did not present any evidence that any Lago Vista employee other than Waldrop knew of the relationship. School officials knew of complaints about Waldrop's tendency to make inappropriate remarks to students, but those complaints did not concern Doe and gave officials no reason to think that Waldrop would have sex with a student.

Instead of strict liability or constructive notice, Doe's theory of recovery relies on the common-law rule that an employer is vicariously liable for the tort of an employee, even if that tort was outside of the scope of employment, if the employee "was aided in accomplishing the tort by the existence of the agency relationship." *Restatement (Second) of Agency* § 219(2)(d) (1958). According to Doe, Waldrop's status as a Lago Vista instructor made his abuse possible: he used his authoritative position to take advantage of an

adolescent student who wanted to please her teachers and fit in socially. The court in *Hastings v. Hancock*, 842 F.Supp. 1315, 1319-20 (D. Kan. 1993), used this theory to deny summary judgment to a plaintiff who sued the owners of a hairstyling school under Title IX for the harassing conduct of the operator of the school. The court noted, however, that it was dealing with an unusual case because the owners had given the harasser complete authority to run the school as he wished. It acknowledged that "it would be too broad a reading of section 219(2) (d) for a court to hold that an employee was aided in accomplishing the tort in that he would not have been there but for his job." *Id.* (citing *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 579 (10th Cir. 1990)).

We rejected this agency theory in *Rosa H. v. San Elizario Indep. School Dist.*, __ F.3d __, __, No. 95-50811 (5th Cir. 1997). Under *Rosa H.*, school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so. Although that case went to a jury on a negligence theory drawn from § 219(2)(b) rather than § 219 (2) (d), we noted that a common-law agency theory would permit courts to use § 219(2) (d) and that that section would generate vicarious liability in virtually every case of teacher-student harassment. *Rosa H.*, __ F.3d at __. We follow *Rosa H.* and refuse to allow plaintiffs to use Title IX, which was enacted under the Spending Clause, to bring tort suits based on the mere fact that a teacher's employment status aided in the commission of sexual harassment.

III.

Because Doe cannot maintain a private cause of action under Title IX based on strict liability, constructive notice, or the common law of agency, we AFFIRM the district court's summary judgment in favor of Lago Vista Independent School District.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50056

D. C. Docket No. A-95-CV-126

JEAN DOE, as Guardian and Next Friend
of Jane Doe; JANE DOE
Plaintiffs - Appellants

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT
Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas, Austin.
Texas, Austin.

Before KING and HIGGINBOTHAM, Circuit Judges and LAKE,* District Judge.

* District Judge of the Southern District of Texas, sitting by designation.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: APR 09 1997

OP-OA-J-1

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit
By /s/
Deputy
New Orleans, Louisiana
APR 09 1997